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The Alaskan Boundary Case

A PAPER read by

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of Chicago, Illinois

before

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at the

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THE ALASKAN BOUNDARY CASE.

BY

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OF CHICAGO, ILLINOIS.

The invitation to me to write a paper for this occasion was coupled with the suggestion that it be upon the Alaskan Boundary Case. So many stirring events have occurred since that decision that not only the general public, but doubtless the profession, have lost much of the interest that it aroused less than a year ago. If I am dealing with a subject that may seem stale and unprofitable, I beg that you will visit the responsibility upon the governing authorities of the Association and not upon a loyal member who felt it his duty to contribute so far as he could toward carrying out the designated programme. Within the limits of a paper like this it will be impossible to give more than a general view of the salient points, and my endeavor shall be to avail myself of this opportunity to put into accessible and permanent form such features of the case as the profession would probably be interested in. The record and arguments fill seven volumes and three portfolios of maps, and it would be a work of very great labor for anyone to acquire for himself anything like a comprehensive understanding of what was involved.

HISTORICAL INTRODUCTION.

The northwest coast of America was the last seaboard of the continent to be occupied by Americans and Europeans. In 1728 Behring discovered the strait between America and Asia, and reached the continent of North America in latitude 65° north. In 1778 the Russians were established throughout the Aleutian Islands. On July 9, 1799, the Czar issued an ukase which granted to the Russian-American Company a trade monopoly and exclusive occupation of

the northwest coast of America down to the 55th parallel. This company was the representative in that region of the Russian government and exercised full governmental powers. From establishments on the islands it extended its trade with the Indians along the continental shore. American vessels, in constantly increasing numbers from 1790, extended their trading into that region and greatly impaired the value of the monopoly that had been granted by the Russian government. The Americans disposed of their furs at Canton and thus secured a great advantage over the Russians, who were not permitted to enter that port. It was charged that the Americans sold liquor and firearms to the natives, which made them both insubordinate and dangerous. Representations were made by Russia to the government of the United States in regard to this "illicit traffic" in 1808 and 1810. After the war of 1812 American vessels increased their activity. In 1821, and mainly on account of American traders, another ukase was issued, addressed "unto all men," granting to Russian subjects all commercial and fishing rights along "the whole of the northwest coast of America from Behring Strait to the 51° north latitude." All foreign vessels were prohibited from approaching within one hundred miles of that coast, and were interdicted to carry on any traffic with the natives "of the islands and of the northwest coast of America in the whole extent here above mentioned."

In the same year a monopoly of commerce and trade along this whole coast was given to the Russian-American Company, extending the former grant from the 55th down to the 51st parallel. The United States and Great Britain were formally notified by Russia of this action. At that time Great Britain had substantially no trade on the northwest coast of America, but the inhibition as to navigating within one hundred miles of this coast, and of the Russian coasts on the west of the Pacific, thus making, in effect a *mare clausum* of the northern part of the Pacific Ocean, at once alarmed Great Britain. Two months

and a half after the official notification Great Britain protested against the assertion of sovereignty by Russia over such a wide extent of ocean and reserved the question as to Russia's claim of ownership of the northwest coast.

On February 25, 1822, the United States government protested against the assertion, both as to maritime and territorial rights. Each government disclosed a purpose to assert in behalf of its citizens the right of trade on the northwest coast, and denied the sovereignty of Russia over those regions. Negotiations were begun between Russia and the United States on the one hand and Russia and Great Britain on the other hand in 1822, looking to an adjustment of these questions. In these negotiations both Great Britain and the United States asserted title to portions of the northwest coast which had been brought into controversy. Inasmuch as the same questions were involved, at the suggestion of the Russian government, the negotiations, both in behalf of Great Britain and of the United States, were carried on at St. Petersburg. It was even suggested that the interests and claims of the three powers be adjusted by a joint convention.

In a letter from Mr. Adams to Mr. Rush, July 22, 1823, an assertion in line with the declaration of President Monroe in his message to Congress in December of the same year was made as follows :

“It is not imaginable that, in the present condition of the world, any European nation should entertain the project of settling a colony on the northwest coast of America.”

When this was brought to the attention of Great Britain, that government announced its intention of proceeding separately in its negotiations with Russia.

The negotiations between Russia and the United States terminated in a treaty signed April 5, 1824, by which Russia withdrew her pretensions with respect to navigating the Great Ocean, and it was agreed that Russia would make no settlements south of $54^{\circ} 40'$ of north latitude on the northwest coast of America, and that the United States would make none north of that degree.

The negotiations between Great Britain and Russia eventuated in a treaty signed February 16, 1825, in which Russia withdrew her pretensions as to exclusive right of navigation, and a territorial line between Russia and Great Britain was established, in respect of the islands and northwest coast of America.

After the treaty of 1825 went into effect Russia asserted without question sovereignty over all the northwest coast of America north of the parallel $54^{\circ} 40'$, exercised jurisdiction over the natives thereof, made surveys and utilized the country so far as it then appeared to be capable of being occupied. In 1826, and from time to time down to the American purchase, it published official maps laying down the territorial boundary between Russia and Great Britain substantially as claimed by the United States in their controversy with Great Britain. The governmental headquarters were at New Archangel, now known as Sitka, and frequent expeditions were sent to the heads of Lynn Canal and Taku Inlet.

In 1839 the Russian American Company and the Hudson's Bay Company, with full knowledge and consent upon the part of their respective governments, entered into a contract by which there was leased to the Hudson's Bay Company substantially all of that part of the northwest coast of America drawn in controversy between the United States and Great Britain, and certainly all that part of it bordering the heads of the interior waters, such as Lynn Canal. The Hudson's Bay Company, with the knowledge and consent of Great Britain, remained in possession of this territory as the tenant of Russia, down to the time that it was ceded by Russia to the United States, and surrendered it when the United States took formal possession.

Shortly after the treaty of 1825 and down to the time of the American purchase, there were issued, from time to time, various official maps by Great Britain, laying down the boundary line between Great Britain and Russia, in such a way as to give Russia the heads of all the inlets and interior waters,

and substantially where the United States contended it should be. Great Britain never, prior to the American purchase, set up any pretension to ownership of any part of those coasts, and never exercised any civil or military jurisdiction in any way over any part of it.

By a convention entered into between the United States and Russia, concluded March 30, 1867, the United States purchased from Russia her title to all the territory which had been confirmed in Russia by her treaty with Great Britain in 1825, paying the sum of \$7,200,000 therefor. The formal transfer of the territory was effected at Sitka on October 18, 1867, and on the same day the United States revenue vessel, the *Lincoln*, took formal possession at the head of Lynn Canal.

When Mr. Sumner made his speech urging the ratification of the treaty, he used a map which had been given to him by the representative of the Russian government, and which showed the possessions claimed by Russia, indicated by a boundary line between Russia and Great Britain laid down substantially as subsequently insisted upon by the United States. This map is now the property of Harvard University, having been presented to it by Mr. Sumner.

Shortly thereafter the United States published a large number of official maps laying down the line in the same way, and these, without doubt, came to the attention of Great Britain. Great Britain continued to publish official maps showing the line in substantially the same way down to the year 1898. The cartographers of the world generally, in their publications, beginning shortly after 1830 and continuing down to the time this controversy arose, indicated the boundary line in the same way. From the day they took possession the United States, without question, constantly asserted and exercised jurisdiction over all of that coast and the adjacent waters. Their revenue cutters and navy all the time dominated those waters. No other country ever questioned their sovereignty. The various Indian tribes inhabiting the coast were brought under their jurisdiction, and understood that they were under the

sovereignty of America. Frequent surveys were made at the heads of all the waters in question. In 1880 all foreign vessels were forbidden to unload at the head of Lynn Canal, and in 1890 a collector of customs was established there. In 1884 the civil government of Alaska was extended to that territory, and the United States Courts and their officers exercised unquestioned jurisdiction over it. The records of the Department of Justice show particular instances, from 1887 to 1894 inclusive, of persons proceeded against criminally for acts done at the head of Lynn Canal. In 1880 and in 1890 a census was taken of the inhabitants of that territory, and a post office was established near the head of Lynn Canal in 1882. Various other acts of government too numerous to mention, and all of them unchallenged, demonstrated that the United States, although they had not penetrated into the mountainous interior, were in full exercise of sovereignty over all the canals, inlets and coasts.

On account of the development of gold deposits in the Cassiar region, the trade of the Stikine River had grown to such proportions as to impress the governments of the United States and Great Britain with the importance of establishing the boundary line.

In 1872, which was forty seven years after the treaty between Great Britain and Russia and five years after the United States had taken possession at the head of Lynn Canal, a correspondence began, at the instance of the Legislative Assembly of British Columbia, suggesting that the boundary line was not laid down in the treaty of 1825 with sufficient definiteness "to render it readily traceable on the ground" and that steps be taken to establish it. These negotiations, which, on the part of the United States, were conducted by Secretary Fish, continued until 1876, but no suggestion was ever made in any of the correspondence that Great Britain claimed any part of the canals or inlets north of Portland Canal, or any part of the coasts bordering them. On the contrary, it was treated as an accepted fact that the line should

be drawn in the interior, as suggested by Secretary Fish, across the Iskoot, Stikine, Taku, Islecat and Chilkat Rivers in such a way as to make it impossible that, at that time, anyone contemplated that it would traverse any of the arms or inlets of the ocean so as to give any part of the coast, or any ports, to Great Britain.

No survey was made then on account of the cost, which was considered as prohibitory. There was a survey on the Stikine River and the adoption of a provisional boundary line in 1878.

The correspondence conclusively shows that down to that time both governments treated the question upon the assumption that the Stikine and the other rivers were crossed by the boundary line, and that it in any event must be drawn around the heads of all of the bays and inlets.

On account of the difficulties in surveying the boundary arising from the mountainous and inaccessible character of the country, an informal unofficial conference took place in Washington between William H. Dall, of the Smithsonian Institution, and G. M. Dawson, of the Geological Survey of Canada. In their correspondence in 1888 Mr. Dawson advanced a theory as to running the line which involved the essence of that insisted on by Great Britain before the tribunal, but he did not put it forward in behalf of the government, and it was not at that time in any way adopted or urged by the British government. It was afterwards asserted by Lord Lansdowne, in a letter of August 18, 1902, that it was accepted as embodying the Canadian view, and in the British case that it was put forward by Mr. Dawson as representing Her Majesty's government as "the contention that the territories surrounding the head of Lynn Canal were British," but the record did not bear out either of these claims.

On July 22, 1892, a treaty was made between the United States and Great Britain providing for a survey "with a view to the ascertainment of the facts and data necessary to the permanent delimitation of said boundary line in accordance with the spirit and intent of the existing treaties in regard to

it between Great Britain and Russia and between the United States and Russia." The high contracting parties agreed as soon as practicable after the report or reports of the commissioners "to consider and establish the boundary line in question." Joint surveys were made, and a joint report was submitted December 31, 1895, but it contained no recommendation for a settlement.

In 1896 gold was discovered in the Yukon territory and there was an immense influx to the Klondike by water to the head of Lynn Canal and thence over the passes into British territory. The head of Lynn Canal, formerly but little thought of, on account of its harbors being the natural gateways to the gold regions, at once became of immense importance. It was not until after the Klondike rush began that any question was raised officially as to the sovereignty of the United States over those waters and coasts. As late as February 11, 1898, during a debate in the Canadian House of Commons, the Minister of the Interior, the Hon. Clifford Sifton, the question as to the ownership of the land about the head of Lynn Canal being under discussion, said that Skagway and Dyea had been in the undisputed possession of the United States for some time past, and that no protests had been made against such occupancy. On February 16, 1898, Sir Wilfred Laurier, in the Canadian House of Commons, said that Dyea and Skagway have "been in the possession of the United States ever since they acquired this country from the Russian government in 1867, and, so far as my information goes, I am not aware that any protest has ever been raised by any government against the occupation of Dyea and Skagway by the United States." On March 7, 1898, he said:

" . . . But if we had adopted the route by the Lynn Canal, that is to say, had chosen to build a railway from Dyea by the Chilkat Pass up to the waters of the Yukon, we would have to place the ocean terminus of the railway upon what is now American territory." . . . "The fact remains that from time immemorial Dyea was in possession of the Russians, and in 1867 it passed into the hands of the Americans, and it

has been held in their hands ever since." . . . So far as I am aware no protest has ever been entered against the occupation of Dyea by the American authorities."

On February 23, 1898, Sir Julian Pauncefote, in a communication to the Secretary of State, made by the direction of the Marquis of Salisbury for the purpose of having a settlement of the boundary line, said :

"The great traffic which is now attracted to the valley of the Yukon in the northwest territory by the recent discovery of gold in that region finds its way there from the coast, principally through certain passes at the head of the Lynn Canal, and it has become more important than ever for jurisdictional purposes that the boundary, especially in that particular locality, should be ascertained and defined.

Her Majesty's government, therefore, propose that the determination of the coast line of the boundary south of Mt. St. Elias should at once be referred to three commissioners (who should be jurists of high standing), one to be appointed by each government, and a third by an independent power. It is suggested further that the commission should proceed at once to fix the frontier at the head of the inlets through which the traffic for the Yukon Valley enters, continuing subsequently with the remaining strip or line of coast."

Thus he, at that date, virtually conceded that Great Britain did not claim that the line ran across the inlets and that it must be fixed "at the head of the inlets."

As there was a failure to fix the boundary under the treaty of 1892 and the surveys made in pursuance of it, another treaty was entered into by which a Joint High Commission was constituted, which met in 1898 and 1899. Before this commission, and for the first time, Great Britain put forward an interpretation of the treaty of 1825, which would make the boundary line run essentially different from anything ever shown upon any Russian, British or United States map, and so as to put into British territory all of the heads of the important inlets and every desirable and safe harbor and anchorage from the mouth of Portland Channel to Yakutat Bay, and much of the mining territory of the

Porcupine, Berners Bay, Juneau, Snettisham, Sumdum, Windham Bay and Unuk River districts, whose mineral wealth for twenty years had been without any question exploited by citizens of the United States. It also included the towns of Pyramid Harbor, Haines, Dyea and Skagway, all of them situated where the United States had exercised undisputed sovereignty since 1867. This claim was so extravagant that the United States members of the Joint High Commission declined to proceed further.

The question became more and more acute. It was manifest that the friendly relations between the two governments might sustain a lesion if it should not be settled, and that another treaty would be necessary.

SIGNING AND RATIFICATION OF CONVENTION OF 1903.

On January 24, 1903, at Washington, a treaty was signed between the United States and Great Britain, and the ratifications of the two governments were exchanged in the city of Washington on the third day of March, 1903.

THE TRIBUNAL.

It was provided in Article I that a tribunal should be immediately appointed to consider and decide certain questions, that it should consist of six impartial jurists of repute, who should consider judicially the questions submitted, each having first subscribed an oath to consider impartially the arguments and evidence and decide thereupon according to his true judgment. Three members were to be appointed by the President of the United States and three by His Britannic Majesty, and all questions were to be decided by a majority of the six.

There were appointed on behalf of the United States, Hon. Elihu Root, Secretary of War, Hon. Henry Cabot Lodge, of Massachusetts, and Hon. George Turner, of the State of Washington, and on behalf of Great Britain, the Lord Chief Justice of England, His Honor Sir Louis Aimable

Jetté, K. C. M. G., Lieutenant Governor of the Province of Quebec, and the Hon. John Douglass Armour, Judge of the Supreme Court of Canada.

On July 11, 1903, the Hon. John Douglass Armour died in London, and on July 28, 1903, Mr. A. B. Aylesworth, K. C., of Toronto, was appointed in his place.

THE AGENTS.

It was provided that each of the high contracting parties should name one person to attend the tribunal as its agent. Hon. John W. Foster, of Washington, D. C., was appointed agent of the United States, and Hon. Clifford Sifton, K. C., Minister of the Interior in the cabinet of the Dominion of Canada, was appointed agent of Great Britain.

THE PROCEDURE.

It was provided that the written or printed case of each party, accompanied by all the evidence relied on to sustain it, should be delivered in duplicate to each member of the tribunal and to the agent of the other party, within two months from March 3, 1903, that within the next two months either party might in like manner deliver a counter case and additional evidence in reply, the power being vested in the tribunal to extend the last mentioned period if it should become necessary by reason of special difficulties arising in the procuring of such additional proof. The tribunal could require the exhibition of documents relied on by a party, and of evidence pertinent to the case which appeared to be in the possession of a party.

Within two months from the expiration of the time limited for filing the counter case, it was the duty of each party to deliver in duplicate to each member of the tribunal, and to the agent of the other party, a written or printed argument showing the points and referring to the evidence relied on, and either party could support the same before the tribunal by oral argument.

The tribunal was to assemble for the first meeting at London as soon as practicable after receiving the commissions, and was authorized to fix the times and places of all subsequent meetings.

It was agreed by diplomatic correspondence that it would be regarded as a compliance with the convention if the cases and counter cases should be presented on the day fixed in London and Washington to the embassies of the respective governments to be forwarded without a formal meeting of the tribunal at London. Great Britain asked an extension of time for the filing of the cases, but this was declined.

Inasmuch as the 3d of May fell upon Sunday, it was agreed that the cases should be delivered on May 2d, but in order to catch the Saturday's steamers it was subsequently agreed that the delivery should be on May 1st. Mr. Choate was authorized by Mr. Hay to receive the British case in London for the American members of the tribunal and the American agent.

On May 15th the British agent wrote to the American agent that it would be impossible to prepare the British counter case within two months and suggested an extension of two months. This was declined on the ground that the American members of the tribunal said that it was impossible to consent because of a contemplated special session of Congress. It was not considered desirable that the Secretary of War and Senator Lodge should be out of the country during such session. This declination was by cablegram on May 25, 1903. On May 29th a seemingly retaliatory step was taken which foreboded serious complications. This was a request on the part of Great Britain for the production of practically all of the documents referred to in the United States case, with the statement that the British agent could examine them in Washington or make arrangements to photograph the originals. This called forth a sharp reply from Mr. Hay, in which he said:

"The list of papers inclosed with your first note embraces documents all of which have been textually set forth in the

case of the United States, many of which are likewise printed in full in the British case without any material variation, and the originals of some of which should exist in the British archives. The documents called for in your second note are likewise textually set forth in the case of the United States. They consist not only of copies of official papers certified to by the chief officer of the respective departments of the government, but of extracts from official printed publications and from books accessible to the general public. It is suggested that such a sweeping request would hardly be approved by the tribunal.

“The treaty does not appear to provide for either the production or examination of original papers by the agent of the other party upon his own request, nor for permission to photograph any papers. Although no reason is given in justification of the unusual request of the British agent, the United States is desirous of avoiding all unnecessary delay and of affording every proper opportunity for verifying anything relied upon by it in its case. I take pleasure, therefore, in assuring you that the British agent, or a representative duly authorized by him, will be given full opportunity to examine and verify the originals in the exclusive possession of this government of anything contained in the case of the United States, provided that no delay is thereby caused either in the delivery of the counter case or of the printed argument, or in the commencement of the oral argument.

“I beg to add that it is the intention of the agent of the United States to take to London the originals or certified copies of all documents and papers contained in the case and counter case of the United States, and to be prepared to produce them at the request of the British agent approved by the tribunal.”

Sir M. H. Herbert replied :

“I have now received a telegram from the Marquis of Lansdowne stating that His Majesty's government are not aware that any precedent exists for coupling the production of original documents with any condition such as that laid down by the United States government.

“The condition, moreover, in the opinion of His Majesty's government amounts to a refusal, as, without an extension of time, it is practically impossible to examine large numbers of documents and to embody the result.

“Both in private litigation and in international arbitrations the right to inspect has never been questioned, and His Majesty’s government cannot, by accepting conditions, cast doubt on the existence of this right and thus establish a precedent which might prove a serious bar to a resort to arbitration.

“The originals in Russian, of which only translations are given, form a great proportion of the documents which it is desired to inspect. His Majesty’s government consider that they have obviously a right to compare the originals with these translations.

“The description which has been given of other documents has not been sufficient for the purpose of tracing copies in England.

“His Majesty’s government consider that in cases where certified extracts are given, they have clearly the right to see the whole documents so as to satisfy themselves that nothing material is contained in the omitted portions.

“His Majesty’s government hope that on further consideration the United States government will agree unconditionally to their request, so that it may be possible to avoid the necessity of calling a special meeting of the tribunal to consider the matter.

“An application for the extension of time is expressly contemplated in the convention, and, unless this application is acceded to, it will be impossible to present fully the reply to the United States case. His Majesty’s government cannot believe that the United States government will be prevented through any question of personal convenience from favorably considering the request, the refusal of which would entail the presentation of the British counter case in an incomplete form, as unsatisfactory to His Majesty’s government as to the tribunal.

“His Majesty’s government would accordingly be glad to learn that the United States government agree to the application of the British agent, whose request for an extension of time they strongly support.”

This fully discloses that the purpose of Great Britain was to force an extension of time.

Mr. Hay, in a lengthy note of June 16, 1903, took the ground that no such special difficulties as the treaty contem-

plated as a condition precedent to the extension of time had arisen. He characterized the request in regard to documents as "a complete impeachment of the American case" and concluded as follows :

"I trust you will assure the Marquis of Lansdowne of the earnest desire of the President to bring this vexed question to a termination in such a way that it will leave no unkind feeling between the two nations, and that he is desirous of meeting his Lordship's wishes as far as possible. He has, therefore, directed me to state that the British agent, or his representative, will be permitted at his convenience to examine all the documents adduced in the case of the United States to which reference is made in your notes of May 29th and June 8th, without any restriction or condition as to the use he shall make of the results of his examination, reserving for the agent of the United States the right to enter such motion or objection before the tribunal when it assembles as he may think proper.

"I have already advised you of the intention of the agent of the United States to have in London the originals or certified copies of all documents and papers contained in the case and counter case of the United States. He has already prepared copies in the original of the Russian documents in the case. Should the British agent not see proper to take advantage of the permission herein given to examine these and other documents in Washington, and should desire it, the Russian documents will be forwarded to him at London.

"In closing, I have the honor to inform you that, in faithful compliance with the treaty, the counter case of the United States, which is already printed, will be delivered in the numbers heretofore indicated, on July 3d, at your embassy in this city, unless you should indicate that delivery at Newport will be more convenient to you."

Mr. Choate took the affair up actively at London with the Attorney General, who stated that while the British counter case would be delivered by July 3d, it would necessarily be incomplete and would be accompanied with a statement that it might have to be supplemented in some form.

In the reply to the note of Mr. Hay of June 16th it was claimed, for the first time, that the British government was

entitled to the necessary time for inquiry at the head of Lynn Canal as to the credibility of certain Indian witnesses who had made affidavits in support of the case of the United States, and the weight which should be attached to their statements, and also for the examination on the spot of certain statements made in the United States case as to acts of occupation and exercise of jurisdiction in the disputed territory by the United States government. The note concluded with a statement that the British government felt bound to press for the extension of time for which they had applied, and that upon a failure to agree it would be necessary to summon the tribunal, in order that the point might be discussed and that this would probably cause the postponement of the discussion of the real question.

The position was taken by the British government, in a note of July 1st, that translations of certain Russian documents had been adduced in support of the case of the United States which did not comply with the convention which provided "that documentary evidence should accompany the case," and that for this variance His Majesty's government would have been justified in refusing to accept the case delivered on behalf of the United States. The claim was made that inasmuch as the documents themselves were not made accessible until after the delivery of the counter case, the British government was entitled to two months from that time to reply to them. The note concluded as follows:

"Should His Majesty's government be disappointed in this expectation they would be fully justified in refusing to proceed further in the matter, and in any case they reserve their right to protest to the tribunal against the reception of evidence to which the opportunity of reply had been denied them, and to claim permission to put in such evidence in rebuttal of the statements in the United States case as they have been prevented from submitting with their counter case.

"His Majesty's government cannot bind themselves to any time for the opening of the oral argument. If the extension they now require is not granted, and the tribunal meets in

September, His Majesty's government reserve the right to show cause before the tribunal for the postponement of the oral argument on the ground that time has not been granted to complete and examine the evidence which should be dealt with in their counter case."

Exception was taken to the assertions of this note on the ground that they involved "the honor and good faith of the United States."

Although the outlook had become exceedingly ominous, the counter cases were delivered on July 3d. The British counter case was preceded by a protest and a reservation of the "right to apply to the tribunal when it shall assemble for permission to put in such supplementary statement and evidence as the justice of the case may call for."

Early in July the British government sent representatives to Washington to examine and photograph documents relied upon in the case of the United States. Much time and labor were devoted to this work, but no material discrepancy was found to exist and no exceptions were relied on.

On July 29th Mr. Sifton proposed to General Foster that the preliminary meeting of the tribunal should be on October 15th "to organize, settle questions of procedure, fix the time when oral argument will be proceeded with, and *also deal with any other question that may be presented by either party for consideration.*" General Foster reminded him that more than three months previously it had been definitely agreed that the preliminary meeting should be on September 3d and declined to consider any postponement.

In view of the repeated demands for extension, the protest, the reservation of the right to ask the tribunal to postpone the hearing, the intimations in regard to exceptions to the regularity of the production of evidence in behalf of the United States, the statement of Mr. Raikes in his note of July 1st that His Majesty's government might, in view of the refusal of extension of time by the United States, be fully justified in refusing to proceed further in the matter, there was

necessarily much doubt as to the course that would be pursued by the British government when the tribunal assembled, and there was naturally conjecture as to whether application would be made for extension, as to whether exceptions would be filed having in view the evisceration of the evidence relied on by the United States, and as to what attitude such procedure would put the parties in.

Enough had transpired to cause the opening day to be looked forward to with grave anxiety. The British government appeared to have had in view the procurement of the desired extension by agreement, and failing in this, the only purpose made manifest was to proceed to a speedy hearing upon the merits. There were no exceptions and no dilatory proceedings. Shortly before the day of meeting, the Attorney General called to arrange for the argument. In response to an inquiry he stated that there would be no motion or exceptions. In a very few minutes it was agreed that one side should open and the other close, there being three alternating arguments on each side. While he stated that he would not urge it, he expressed a preference that the opening should be in behalf of Great Britain, which was promptly conceded.

The recital in the minutes as to the representatives of the respective governments is as follows:

The Hon. John W. Foster, the United States Agent, and Hon. Clifford Sifton, K. C., the British Agent.

Hon. Jacob M. Dickinson, Mr. David T. Watson, Hon. Hannis Taylor and Mr. Chandler P. Anderson appeared as counsel for the United States.

Mr. Robert Lansing, Solicitor of the United States Agency, Mr. O. H. Tittman, Mr. W. C. Hodgkins, Mr. Otis T. Cartwright, Mr. John T. Newton and Mr. F. R. Hanna, members of the United States Agent's staff.

The Attorney General (Sir Robert B. Finlay, K. C., M. P.), the Solicitor General (Rt. Hon. Sir Edward H. Carson, K. C., M. P.), Mr. Christopher Robinson, K. C., Mr. F. C. Wade, K. C., Mr. L. P. Duff, K. C., and Mr. A. Geoffrion, K. C.; Mr. S. A. T. Rowlatt and Mr. J. A. Simon appeared as counsel for Great Britain.

Mr. W. F. King and Mr. A. P. Collier, members of the British Agent's staff.

Mr. Reginald Tower, His Britannic Majesty's Minister at Munich and Stuttgart, as Secretary to the Tribunal; Mr. J. R. Carter, Second Secretary in the American Embassy, London, and Mr. Joseph Pope, C. M. G., Under Secretary of State of Canada, as Associate Secretaries.

In accordance with the precedents of courtesy which have obtained on such occasions, and also on account of his distinguished personality and the high position held by him, Lord Alverstone was chosen to preside over the tribunal. Sittings were held in the foreign office on Downing Street each day at eleven and continued until one-thirty. An adjournment was usually taken for half an hour for lunch, served very elaborately in the adjoining apartments by the British government, and there were afternoon sessions until four.

The argument began on the 15th of September and was concluded on the 8th of October. The counsel for America consumed about eight and a half and those for Great Britain about nine and a half days, of which time the Attorney General, Sir Robert Finlay, who made the opening argument, occupied six and a half days in an elaborate discussion dealing with every question in the case. On the main question he had a hopeless cause, in the defense of which, however, he expended such infinite pains and displayed so much forensic skill that he might truthfully have said :

“ . . . si Pergama dextra
Defendi possent etiam hac defensa fuissent.”

The decision was rendered on October 20th. It was not announced from the bench nor were the opinions read. The President, in accordance with the provisions of the treaty, handed to the respective agents the decision of the tribunal upon the several questions submitted for their determination, accompanied by maps.

All of the proceedings and arguments were taken down stenographically and printed each day and a copy was given next morning to each member of the tribunal and the representatives of the respective governments.

On the thirtieth day of September, the President announced the death of His Excellency The Rt. Hon. Sir Michael H. Herbert, K. C. M. G., C. B. On account of the distinguished position held by him, and also from the fact that he had, in behalf of Great Britain, negotiated the treaty under which the tribunal was sitting, upon the motion of the counsel for the United States, seconded by the counsel for Great Britain, an adjournment was taken in honor of his memory.

QUESTIONS SUBMITTED.

The treaty provided that the tribunal should, in the settlement of the questions, consider the treaty between Great Britain and Russia of February 28/16, 1825, and that between the United States and Russia of March 30/18, 1867, and particularly Articles III, IV and V of the first mentioned treaty, which in the original text are word for word as follows :

“III. La ligne de démarcation entre les Possessions des Hautes Parties Contractantes sur le Côte du Continent et les Iles de l'Amérique Nord-ouest, sera tracée ainsi qu'il suit :

“A partir du Point le plus méridional de l'Ile dite Prince of Wales, lequel Point se trouve sous la parallèle du 54^{me} degré 40 minutes de latitude Nord, et entre le 131^{me} et le 133^{me} degré de longitude Ouest (Méridien de Greenwich), la dite ligne remontera au Nord de long de la passe dite Portland Channel, jusqu'au Point de la terre ferme où elle atteint le 56^{me} degré de latitude Nord : de ce dernier point la ligne de démarcation suivra la crête des montagnes situées parallèlement à la Côte, jusqu'au point d'intersection du 141^{me} degré de longitude Ouest (même Méridien) ; et, finalement, du dit point d'intersection, la même ligne méridienne du 141^{me} degré formera, dans son prolongement jusqu'à la mer Glaciale, la limite entre les Possessions Russes et Britanniques sur le Continent de l'Amérique Nord-ouest.

“ IV. Il est entendu, par rapport à la ligne de démarcation déterminée dans l’Article précédent :

1^o. Que l’île dite Prince of Wales appartiendra toute entière à la Russie :

2^o. Que partout où la crête des montagnes qui s’étendent dans une direction parallèle à la Côte depuis le 56^{me} degré de latitude Nord au point d’intersection du 141^{me} degré de longitude Ouest, se trouverait à la distance de plus de dix lieues marines de l’Océan, la limite entre les Possessions Britanniques et la lisière de Côte mentionnée ci-dessus comme devant appartenir à la Russie, sera formée par une ligne parallèle aux sinuosités de la Côte, et qui ne pourra jamais en être éloignée que de dix lieues marines.

V. Il est convenu en outre, que nul Etablissement ne sera formé par l’une des deux Parties dans les limites que les deux Articles précédens assignent aux Possessions de l’Autre. En conséquence, les Sujets Britanniques ne formeront aucun Etablissement, soit sur la côte, soit sur la lisière de terre ferme comprise dans les limites des Possessions Russes, telles qu’elles sont désignées dans les deux Articles précédens ; et de même, nul Etablissement ne sera formé par des Sujets Russes au delà des dites limites.”

It was provided that the tribunal should consider any action of the several governments preliminary or subsequent to the conclusion of said treaties, so far as the same tend to show the original and effective understanding of the parties in respect to the limits of their several territorial jurisdictions under and by virtue of the provisions of said treaties. In Article IV, referring to the treaty of 1825, the questions were stated as follows :

“ Referring to Articles III, IV and V of the said treaty of 1825, the said tribunal shall answer and decide the following questions :

“ 1. What is intended as the point of commencement of the line ?

“ 2. What channel is the Portland Channel ?

“ 3. What course should the line take from the point of commencement to the entrance to Portland Channel ?

“ 4. To what point on the 56th parallel is the line to be drawn from the head of the Portland Channel, and what course should it follow between these points ?

"5. In extending the line of demarcation northward from said point on the parallel of the 56th degree of north latitude, following the crest of the mountains situated parallel to the coast until its intersection with the 141st degree of longitude west of Greenwich, subject to the condition that if such line should anywhere exceed the distance of ten marine leagues from the ocean, then the boundary between the British and the Russian territory should be formed by a line parallel to the sinuosities of the coast and distant therefrom not more than ten marine leagues, was it the intention and meaning of said convention of 1825 that there should remain in the exclusive possession of Russia a continuous fringe or strip of coast on the mainland not exceeding ten marine leagues in width, separating the British possessions from the bays, ports, inlets, havens and waters of the ocean, and extending from the said point on the 56th degree of latitude north to a point where such line of demarcation should intersect the 141st degree of longitude west of the meridian of Greenwich?

"6. If the foregoing question should be answered in the negative, and in the event of the summit of such mountains proving to be in places more than ten marine leagues from the coast, should the width of the *lisière* which was to belong to Russia be measured (1) from the mainland coast of the ocean, strictly so called, along a line perpendicular thereto, or (2) was it the intention and meaning of the said convention that where the mainland coast is indented by deep inlets, forming part of the territorial waters of Russia, the width of the *lisière* was to be measured (a) from the line of the general direction of the mainland coast, or (b) from the line separating the waters of the ocean from the territorial waters of Russia, or (c) from the heads of the aforesaid inlets?

"7. What, if any exist, are the mountains referred to as situated parallel to the coast, which mountains, when within ten marine leagues from the coast, are declared to form the eastern boundary?"

OPPOSING CONTENTIONS AND DECISION.

There was no controversy as to the first question, and it having been stated in the "case" for each government that the line began at Cape Muzon, the tribunal unanimously decided accordingly.

In respect of the second question, it was agreed that the body of water extending northeast from about the eastern end of Pearse Island was a part of Portland Channel. The United States contended that from this point Portland Channel extended out to the ocean south of Pearse and Wales Islands, and Great Britain contended that from that point it extended to the ocean north of those islands. A great many arguments were advanced by both sides on this question. It was manifest that it was regarded as the strongest claim put forward by Great Britain in the case. The Attorney General devoted nearly three days to its discussion. Vancouver had been sent by the British government to the northwest coast of America for the purpose of discovering a navigable river that could be used for bringing out furs from the British possessions in the interior. He explored the entire coast and in 1798 published a narrative, accompanied by charts showing Portland Canal.

These charts were known to have been before the negotiators of the treaty of 1825, but there was no direct evidence that the narrative was before them or was relied on by them. Tried by the charts alone, the contention of the United States was the stronger. Tried by the narrative alone, the general contention of Great Britain was conclusively established. If it were assumed that both the charts and the narrative were used by the negotiators, the question was involved in much doubt, but the evidence was more favorable to the British view.

The tribunal unanimously agreed that Portland Channel passed to the north of Pearse and Wales Islands, and a majority, consisting of Lord Alverstone, Mr. Root, Mr. Lodge and Mr. Turner, decided that after passing to the north of Wales Island it continued out to the ocean between Wales and Sitklan Islands through Tongass Passage. This gave Wales and Pearse Islands to Great Britain and Sitklan and Kanagunut Islands to the United States. Each has a length of about three and a half statute miles. Sitklan is about one and one-fourth miles wide, and has an area of 3.62 square miles, while Kanagunut has

only 1.97 square miles. They are of but little known value, and have no good harbor. They were supposed by Canada to have great strategic value in case of war on account of their proximity to Fort Simpson, which is contemplated as the terminus of a trans-continental railroad. Lord Alverstone filed a separate opinion on the second question, giving the reasons for his decision. Mr. Root, Mr. Lodge and Mr. Turner also filed a joint opinion on this question. Much has been said in regard to drawing the line through Tongass Passage. The explanation given by the commissioners of the United States is as follows :

“ He (Vancouver) followed the channel westerly, passing what has been known as Tongass Passage, between Wales and Sitklan Islands, through which he looked and saw at a short distance the ocean. Desiring, however, to find, if possible, another opening to the ocean which followed the general line of the continent, he kept on, through the narrow passage which passes north of Sitklan and Kannaghunut Islands, and came out into the ocean opposite Cape Fox. Near Cape Fox he encamped. He then explored the waters around Revilla Gigedo Island, and on the 14th of August returned to Cape Fox. At dawn the next morning, which in that latitude and in August must have been at a very early hour, he set out to return to his vessels, and he writes that in the forenoon, which must have been some hours after he started from the point opposite the narrow channel out of which he had issued the 2d of August, he passed the mouth of the channel which he had previously explored, and which he named ‘Portland’s Canal, in honor of the noble family of Bentinck.’ ”

His exact language is as follows :

“ In the forenoon we reached that arm of the sea whose examination had occupied our time from the 27th of the preceding to the 2d of this month. The distance from its entrance to its source is about seventy miles, which, in honor of the noble family of Bentinck, I named ‘Portland’s Canal.’ (Pp. 370-71, Vancouver.)

“ It seems clear from this statement that if he considered, as the other extracts from his narrative already cited seem to prove, the northerly channel as the natural extension of the

deep inlet running to the 56th parallel, he must have looked into it through Tongass Passage, and then and there gave it its name. Moreover, it is quite obvious from the maps that there are three outlets for the waters which come through the northern channel and are swelled by those from the inlets about Fillmore Island. Two of them are very small, so small as to be practically impossible to navigate. The third is the Tongass Passage, and that seems beyond a question, on the face of both the maps and the text, to be the true entrance to the channel which passes north of Wales and Pearse Islands. Accepting Vancouver's narrative as having the greatest weight, the conclusion follows that the award of the tribunal must be that the Portland Channel intended by the makers of the treaty of 1825 was that body of water which entered the sea by the Tongass Passage and passed thence north of Wales and Pearse Islands, and so onward to the immediate neighborhood of the 56th parallel."

On this point Lord Alverstone said :

"The narrative of Vancouver refers to the channel between Wales Island and Sitklan Island, known as Tongass Passage, as a passage leading south-southeast towards the ocean which he passed in hopes of finding a more northern and westerly communication to the sea, and describes his subsequently finding the passage between Tongass Island on the north and Sitklan and Kannaghunut on the south. The narrative and the maps leave some doubt on the question whether he intended the name Portland Canal to include Tongass Passage as well as the passage between Tongass Island on the north and Sitklan and Kannaghunut Islands on the south. In view of this doubt, I think, having regard to the language, that Vancouver may have intended to include Tongass Passage in that name, and looking to the relative size of the two passages I think that the negotiators may well have thought that the Portland Channel, after passing north of Pearse and Wales Islands, issued into the sea by the two passages above described."

Mr. Aylesworth filed a separate dissenting opinion, dealing with all the controverted questions and disagreeing with the majority upon all of them, except as to Portland Channel extending north of Pearse and Wales Islands. As to its continuation through Tongass Passage, he said :

"No intelligible reason for selecting it has been given in my hearing. No memorandum in support of it has been presented by any member of the tribunal, and I can therefore only conjecture the motives which have led to its acceptance.

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"How can such a determination be reconciled with our duty to decide judicially upon the questions submitted to us? It is no decision upon judicial principles; it is a mere compromise dividing the field between the contestants."

He pronounced it as "nothing less than a grotesque travesty of justice." He concludes his opinion as follows:

"Finally, I have merely to say this further, that the course the majority of this tribunal has decided to take in regard to the islands at the entrance of Portland Channel is, in my humble judgment, so opposed to the plain requirements of justice, and so absolutely irreconcilable with any disposition of that branch of this case upon principles of a judicial character, that I respectfully decline to affix my signature to their award."

In the Fur Seal Arbitration, Senator Morgan and Mr. Justice Harlan voted upon the main points of controversy against the finding of the majority and filed very elaborate dissenting opinions. Nevertheless they signed the award. The first of the conventions agreed on by the Hague Tribunal provided that awards must be signed by each member of the tribunal, the members in the minority having the liberty, in signing, to state their dissent.

This, of course, was not obligatory upon the members of the Alaskan Tribunal, as the treaty only required the decision to be signed by the assenting members, but it showed the mature judgment of diplomats as to the procedure which seemed desirable to be followed by arbitrators, and this judgment was ratified by the concurrent assent of twenty-six nations to the Hague Tribunal convention.

Sir Louis Jetté filed a dissenting opinion without any arraignment of his associates, and likewise declined to sign the award.

The third question involved no real difficulty after the second question was answered. The line was drawn direct from the point of beginning to the middle of the channel of the body of water which had been declared to be Portland Channel.

The United States requested that it be answered to the fourth question that the line should be drawn from the head of Portland Channel northeasterly, along the same course which it had pursued up to the point where it touched the mainland at the head of Portland Channel, until it intersected the 56th parallel of north latitude. The treaty provided that the line should proceed to the north along Portland Channel to the point where it strikes the 56th degree of latitude north, and that from this last mentioned point it should follow the crest of the mountains situated parallel to the coast. Portland Channel did not reach to that parallel. It was contended by Great Britain that the mountains which the treaty meant coincided with the parallel at a point about fifty-seven miles almost due west of the head of Portland Channel. The discussion of this question involved the meaning of the words "coast" and "crest of the mountains," the determination of which was necessary for answering the fifth and seventh questions. The tribunal, Mr. Aylesworth and Sir Louis Jetté dissenting, decided that the point to which the line is to be drawn from the head of Portland Channel is the point on the 56th parallel of latitude which is indicated by the letter "D" on the map attached to and made a part of the findings of the tribunal. The point is almost directly north of the head of Portland Channel, near the intersection of the 56th parallel and the 130th meridian, and does not vary materially from the point contended for by the United States.

—The fifth and seventh questions were inseparable in the argument. The language of the treaty was that the line of demarcation should follow the summit of the mountains situated parallel to the coast. It was necessary to determine the meaning of the word "coast" as used in the treaty, and what

mountains, if any, answered to those meant by the treaty. It was known that the negotiators had before them and consulted Vancouver's charts and two maps based upon them, namely, an official map published by Russia in 1802 and one published by Faden in 1823. Upon all these maps there appeared a distinct chain of mountains with a continuous crest extending from near the head of Portland Channel northerly, maintaining a general parallelism to the mainland coast, up to Mt. St. Elias and beyond, and on all of them the mountain chain so depicted passed around the heads of all of the inlets, and on none of them was it broken, with a trend across any of the inlets. It indicated a natural boundary between the coast and the country to the interior. The correspondence showed that the negotiators had in mind a chain or range of mountains existing approximately about ten marine leagues from and generally parallel to the coast. The establishments of Russia were on the islands, but her trade was mainly with the inhabitants along the coast. It was apparent throughout the entire negotiations that Russia sought, and that Great Britain intended to concede, a strip of coast along the continent bounded by a mountain barrier, and that this should be a protection to the establishments of Russia upon the islands, and to her trade with the Indians along the coast, and that it should not be penetrated by Great Britain, except under the right given to Great Britain, to pass along navigable rivers extending from British territory through this border, which was designated as a *lisière*, to the sea.

Subsequent explorations developed that there was no such continuous chain, or mountain crest, in the interior, as Vancouver and the map makers who followed him had depicted. The whole region is mountainous, composed of an elevated plateau, with numerous peaks, without any regular arrangement in a mountain chain. There are short ranges, but no distinct general range, as far back as the explorations have gone. The United States contended that, taking the correspondence and the maps with reference to which the treaty was

made, and the maps which for so many years after the treaty laid down the boundary line around the heads of the bays and inlets, it was not only the manifest purpose of the treaty that the line should, in any event, run around all of the interior waters, but that all three of the governments had by their acts put this practical interpretation upon the treaty. It was also contended for the United States that, while there was no range of mountains answering to the treaty, the purpose nevertheless was plain that the line with reference to the heads of the inlets should be drawn with the same relation that the mountains depicted upon the maps bore to the heads of the inlets, and that the coast to which this line was to be drawn parallel was the mainland coast extending around the heads of all interior waters. On the other hand, Great Britain contended that "coast" meant, not the whole physical coast of the country, but rather a political coast; that is to say, not a coast that is coincident with the ocean and the land, but a coast defined by a line drawn from headland to headland where they were not more than ten miles apart. Such a line would run across bays and inlets and canals. Great Britain contended that the mountains meant were those next to the sea, and that the tribunal should draw the line along the mountains nearest to the sea and parallel to the political coast. The result of this contention would have been to carry the line across Glacier Bay, Taku Inlet, Lynn Canal and other similar waters, and take from the United States every safe harbor on the northwest coast of America. This contention virtually obliterated the *lisière*, which was intended to be a protection to Russia, and so far from giving a continuous strip of continent, the *lisière* would have been broken by stretches of water.

While the United States contended that there was no definite range of mountains such as the treaty contemplated, and that in the absence of such range, the line was to be drawn under the alternative provision, ten marine leagues from the continental coast and generally parallel to it; yet it also con-

tended that if the tribunal should find that the plateau elevation and the peaks thereon constituted a mountain summit, within the meaning of the treaty, it was necessary, in selecting the peaks, and in drawing this mountain line, so to locate it that it would pass along peaks which could be associated in a way that would carry the line around the heads of the interior waters, and that it would not be in accordance with the manifest purpose of the treaty to connect peaks directly which were situated on opposite sides of any of these bays and inlets and thus break up the coast line and destroy the *lisière*. Lord Alverstone, Mr. Root, Mr. Turner and Mr. Lodge answered the fifth question in the affirmative. Lord Alverstone wrote a separate opinion on that question and the other three wrote a joint opinion. It is a remarkable fact that no opinion was written by the majority of the court upon the seventh question. The question as to the mountains was incidentally discussed in the opinion upon the fifth question.

The tribunal answered the seventh question to the effect that there were mountains in the country which had been explored which answered to those referred to in the treaty, and the line was drawn connecting mountain peaks, and substantially where the United States contended that it should be drawn. The line crossed the rivers as had been indicated by Mr. Fish. A stretch of the line connecting a peak north of parallel 57 with a peak north of Taku River was indicated arbitrarily, as the country had not been surveyed, the distance being about 130 miles. With this exception there can hardly be any room for controversy as to exactly where the boundary line is, for every peak is carefully designated, and the line is actually laid down upon the map which is attached to and made a part of the judgment.

The sixth question was not answered, as it was only to be considered in the event that the fifth question should be answered in the negative.

With the exception of Wales and Pearse Islands and the sovereignty over half of the channel south of them, the United States were entirely successful.

CONCLUSION.

It was not strictly an arbitration, but rather what might be termed an arbitral tribunal, for an arbitration is usually composed of an odd number and with one or more disinterested members. The President was not content to submit to an arbitration, as ordinarily constituted, the determination of our right to territory which for so long a time had been in the undisputed possession of the United States. Following the plan proposed in the Olney-Pauncefote Treaty of 1897, which was not ratified by the Senate, it was agreed to submit the controversy to the judgment of a tribunal composed of an equal number of appointees by each government, with the requirement that at least four should concur. It is not conceivable that it was contemplated that a convention brought about after such long negotiations, and in regard to a difference of such long standing, should result in a fiasco. Both governments hoped and expected that there would be a determination of the whole matter. It is manifest that cherishing this hope they reposed great confidence in the impartiality and courage of the appointees, for there could be no determination possible without at least one member finding adversely to his national sympathies. That such hope and confidence were cherished is made manifest by the recital of the treaty that it would be unfortunate if a majority of the tribunal should fail to agree upon any of the points submitted for their decision. The way in which the tribunal was constituted, and the fact that it settled the controversy, will for all time make it memorable in the history of peace measures. No one who values the peace of nations could fail to rejoice that such a grave controversy, which threatened to become more and more acute, was finally and amicably settled.

If the tribunal had failed to reach a decision, the situation could not but be regarded with grave apprehensions. Great Britain had set up a formal claim to territory over which the United States had exercised undisputed sovereignty for over thirty years. Would Great Britain have remained quiescent

if her title had been pronounced good by her three members of the tribunal? If the three appointees of the United States had all declined to concur in such judgment, would the United States, without compulsion, have surrendered territory over which they and their vendor had, without question, asserted sovereignty for over seventy years? If this treaty had failed, would the United States have been willing to submit to the decision of a foreign umpire? To what extent would party spirit in both countries have inflamed the situation? These are grave questions, and such as would make anyone who understands the great considerations that should bind together the two great English-speaking nations shudder to contemplate; but happily they are questions which the judicial impartiality and courage of a great Englishman have made it unnecessary to answer. No man can achieve an act of real greatness and hope to escape censure. With his profound knowledge of human history and of the narrow limitations of selfish natures, he doubtless expected it, as did Marshall in respect of his action in the trial of Burr, and his high sense of duty in a trying situation was, we may be sure, like that expressed by Marshall when he said:

“That this court dares not usurp power is most true. That this court does not shrink from its duty is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without reproach, would drain it to the bottom. But if he has no choice in the case, if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.”

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